SIVARASA RASIAH

v.

BADAN PEGUAM MALAYSIA & ANOR

COURT OF APPEAL, KUALA LUMPUR
GOPAL SRI RAM JCA
ABDUL KADIR SULAIMAN JCA
MOHD SAARI YUSOF JCA
[CIVIL APPEAL NO: W-01-55-2001]
29 JANUARY 2002

ADMINISTRATIVE LAW: *Exercise of administrative powers - Judicial review - Leave to apply for judicial review - Whether declarations sought therein an assault upon the constitutionality of s. 46A Legal Profession Act 1976 - Whether application for judicial review under O. 53 Rules of the High Court 1980 proper - Whether court should hear arguments on substantive motion before granting relief - Whether justice of case to be considered - Whether dismissal of leave application by High Court should be set aside*

The applicant, an advocate and solicitor, was disqualified from being a member of the Bar Council by virtue of s. 46A of the Legal Profession Act 1976 ('LPA') due to his appointment as Vice-President of a political party. Dissatisfied with this statutory disqualification, he applied for leave for judicial review under O. 53 r. 1 of the Rules of the High Court 1980. The learned High Court judge dismissed the application. Hence this appeal before the Court of Appeal.

An objection was raised by the second defendant that the application should not be granted as the declarations sought were a frontal assault upon the constitutionality of s. 46A of the LPA. However, the applicant claimed that the objection was premature and that this, together with any other points already taken at the leave stage were really matters that ought to be considered and dealt with at the hearing of the substantive motion.

Held:
Per Gopal Sri Ram JCA

[1] The appellant was entirely correct in invoking the provision of O. 53 RHC. Order 53 in its present form was introduced to cure the mischief of its precursor which was much narrower and more restrictive. (p 705 h)

[2] Two points may be noted when considering O. 53. Firstly, that it begins by referring to the powerful and enabling provision introduced for the first time in law by Parliament in para. 1 of the schedule to the Courts of Judicature Act 1964. Secondly, it is the principle which governs the construction of rules of court. A rule of court should not be interpreted in such a way as to result in unfairness or produce manifest injustice. A manifest injustice would occur if O. 53 RHC is read restrictively so as to permit an applicant to claim a declaration only where he applies for it jointly with some other remedy. (pp 705 i & 706 a, f-g)

[3] By virtue of para. 1 of the Schedule to the Courts of Judicature Act 1964, the courts have power to issue such orders and grant such relief as is appropriate to the particular circumstances of a given case. (p 706 h)

[4] Since the High Court has ample power and jurisdiction to grant appropriate relief after hearing full argument on the substantive motion, the point about the motion paper suffering from inadequacies of drafting, justifiably made in the present case came to naught. (p 707 h)

[5] If the applicant has asked for remedies which he is patently not entitled to, but adduces facts and establishes grounds entitling him to relief, it is open to the judge hearing the substantive motion to invite arguments on the grant of relief appropriate to the applicant's factual situation. (p 707 i)

[6] This was not a case of collateral attack. A genuine collateral attack is usually taken by way of defence. (p 708 b, c)

Per curiam:

[1] In this day and age applications and suits are disposed of on purely technical and procedural grounds without even the slightest attempt to ensure that justice according to the merits of a particular case is done. In the performance of duty to decide according to law, judges have forgotten to do justice according to law and the substantial merits of each case. (p 708 d-e)

[2] This court had the jurisdiction when granting leave to hear the substantive motion on a formal undertaking to file the same but it ought not to be exercised in the present instance. There were important questions of constitutional interpretation upon which this court must have the benefit of the primary judge. (p 709 e)

[Appeal allowed; applicant to deliver substantive motion within 14 days; applicant to re-serve his affidavit and statutory statement on both AG's Chambers and Bar Council; deposit refunded; no order as to costs.]

*[**Bahasa Malaysia** Translation Of Headnotes]*

Pemohon, seorang peguambela dan peguamcara, telah tidak layak menjadi seorang ahli Majlis Peguam menurut s. 46A Akta Profesyen Undang-Undang 1976 ('LPA') disebabkan oleh perlantikan beliau sebagai Timbalan Presiden sebuah parti politik. Tidak berpuas hati dengan ketidak-layakan statutory ini, beliau telah memohon kebenaran untuk kajian semula kehakiman di bawah A. 53 k. 1 Kaedah-Kaedah Mahkamah Tinggi 1980. Hakim Mahkamah Tinggi yang bijaksana telah menolak permohonan tersebut atas alasan prosedural. Dengan itu, rayuan ini di hadapan Mahkamah Rayuan.

Satu bantahan telah dibangkitkan oleh defendan kedua bahawa permohonan tersebut tidak seharusnya diberikan kerana pengisytiharan-pengisytiharan yang dipohon adalah suatu serangan terhadap perlembagaan s. 46A LPA tersebut. Walaubagaimanapun, pemohon tersebut telah menuntut bahawa bantahan tersebut adalah pra-masa dan bahawa perkara ini, dengan yang lain yang telah pun diambil diperingkat kebenaran adalah perkara-perkara yang seharusnya dipertimbangkan dan diuruskan di perbicaraan usul substantif ini.

Diputuskan:
Oleh Gopal Sri Ram HMR

[1] Perayu adalah sesungguhnya betul dalam menggunakan peruntukan A. 53 KMT. Aturan 53 dalam bentuk semasanya telah diperkenalkan untuk memulihkan keburukan pelopornya yang mana adalah lebih sempit dan lebih terhad.

[2] Dua perkara boleh diperhatikan ketika mempertimbangkan A. 53. Pertamanya, bahawa ianya bermula dengan merujuk kepada peruntukan yang berkuasa dan berkebolehan yang telah diperkenalkan buat pertama kalinya di sisi undang-undang oleh Parliamen dalam perenggan 1 Jadual kepada Akta Mahkamah-Mahkamah Kehakiman 1964. Keduanya, ianya adalah prinsip yang menguasai pembentukan kaedah-kaedah mahkamah. Sesuatu kaedah mahkamah tidak seharusnya ditafsirkan dengan cara sedemikian sehingga menyebabkan ketidakadilan atau menghasilkan ketidakadilan yang ketara. Sesuatu ketidakadilan yang ketara akan berlaku jika A. 53 KMT dibaca secara terhad supaya boleh membenarkan seseorang pemohon untuk menuntut satu pengisytiharan hanya di mana beliau memohonnya secara bersesama dengan beberapa remedi lain.

[3] Menurut perenggan 1 Jadual kepada Akta Mahkamah-Mahkamah Kehakiman 1964, mahkamah-mahkamah mempunyai kuasa untuk mengeluarkan perintah-perintah sedemikian dan memberikan relief sedemikian sepertimana yang berpatutan kepada keadaan-keadaan khusus sesuatu kes yang tertentu.

[4] Oleh kerana Mahkamah Tinggi mempunyai kuasa dan bidangkuasa yang secukupnya untuk memberikan relief yang berpatutan selepas mendengar hujahan penuh atas usul substantif tersebut perkara mengenai kertas usul yang tidak dideraf dengan baik, yang secara berpatutan dibuat dalam kes ini menjadi sia-sia belaka.

[5] Jika pemohon telah meminta remedi-remedi yang mana beliau secara jelasnya tidak berhak untuk mendapatkannya, tetapi mengemukakan fakta-fakta dan menentukan alasan-alasan yang memberikan beliau hak kepada relief, ianya adalah terpulang kepada hakim yang mendengar usul substantif itu untuk meminta hujahan atas pemberian relief yang wajar kepada situasi faktual pemohon tersebut.

[6] Ini bukannya merupakan kes serangan kolateral. Sesuatu serangan kolateral yang tulen adalah selalunya dilaksanakan melalui pembelaan.

Per curiam:

[1] Pada hari dan zaman ini permohonan-permohonan dan guaman dilupuskan semata-mata atas alasan prosedural dan teknikal tanpa sedikitpun percubaan untuk memastikan bahawa keadilan menurut merit sesuatu kes yang khusus telah dilaksanakan. Dalam melaksanakan tugas untuk memutuskan menurut undang-undang, hakim-hakim telah terlupa untuk melakukan keadilan menurut undang-undang dan merit-merit substansial setiap kes.

[2] Mahkamah ini mempunyai bidangkuasa ketika memberikan kebenaran untuk mendengar usul substantif atas akujanji formal untuk memfailkannya tetapi ianya tidak perlu dilaksanakan dalam keadaan semasa. Terdapat soalan-soalan penting mengenai pentafsiran berperlembagaan di atas yang mana mahkamah ini semestinya mempunyai manfaat hakim utama.

[Rayuan dibenarkan; pemohon haruslah menyampaikan usul substantif dalam tempoh 14 hari; pemohon hendaklah menyampaikan semula afidavit dan pernyataan berkanun beliau ke atas Kamar Peguam Negara dan Majlis Peguam; deposit dibayar balik; tiada perintah berhubung dengan kos.]

Case(s) refered to:

Bank of America National Trust and Savings Association v. Chai Yen [1980] 1 MLJ 198 ***(refd)***

Boddington v. British Transport Police [1998] 2 WLR 639 ***(refd)***

British Steel plc v. Customs & Excise Commissioners [1997] 2 All ER 366 ***(refd)***

Dwarka Nath v. Income Tax Officer AIR [1966] SC 81 ***(refd)***

Heywood v. Hull Prison Board of Visitors [1980] 3 All ER 594 ***(refd)***

Mohamed Nordin Johan v. Attorney General, Malaysia [1983] 1 CLJ 130; [1983] CLJ (Rep) 271 ***(refd)***

O' Reilly v. Mackman [1982] 3 All ER 1124 ***(refd)***

Pawlowski v. Dunnington [1999] Simon Tax Cases 550 ***(refd)***

PJ Irani v. State of Madras AIR [1961] SC ***(refd)***

Re Tillmire Common, Heslington [1982] 2 All ER 615 ***(refd)***

Sim Seoh Beng & Anor v. Koperasi Tunas Muda Sungai Ara Bhd [1995] 1 CLJ 491 ***(refd)***

Steed v. Secretary of State for the Home Department [2000] 3 All ER 226 ***(refd)***

Trustees of the Dennis Rye Pension Fund & Anor v. Sheffield City Council [1997] 4 All ER 747 ***(refd)***

Wandsworth London Borough Council v. Winder [1985] AC 461 ***(refd)***

Legislation referred to:

Courts of Judicature Act 1964, Sch. para 1

Legal Profession Act 1976, s. 46A

Rules of the High Court 1980, O. 15 r. 16, O. 53

Indian Constitution, art. 226

For the appellant - Tommy Thomas; M/s Tommy Thomas

For the 1st respondent - Cyrus Das (Bastian Vendargon & Hamid Sultan Abu Bakar); M/s Hamid Sultan & Partners

For the 2nd respondent - Abdul Aziz Abdul Rahim SFC (Alice Loke FC); Peguam Negara Malaysia

[Appeal from High Court, Kuala Lumpur; No: R2-25-83-2001]

Reported by Usha Thiagarajah

JUDGMENT

Gopal Sri Ram JCA:

This appeal is directed against the order of the High Court dismissing the appellant's application for leave to apply for judicial review. The Malaysian Bar (the first respondent before us) does not oppose this appeal, but the Government of Malaysia (the second respondent) does. The facts relevant to the present appeal lie within a narrow compass.

The appellant is an advocate and solicitor. On 14 July 2001 he became the Vice President of a political party. As a member of the Bar, he is entitled to be elected to the executive arm of the Malaysian Bar, namely, the Bar Council. In fact he was elected to the Bar Council for year 2001-2002. But s. 46A of the Legal Profession Act 1976, disqualifies him from holding office. That section reads as follows:

> 46A. (1) A person shall be disqualified for being a member of the Bar Council or a Bar Committee, or of any committee of the Bar Council or a Bar Committee:
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> (a) unless he is and has been an advocate and solicitor for a period of not less than seven years, or for periods which in the aggregate amount to not less than seven years; or
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> (b) if he is a member of either House of Parliament, or of a State Legislative Assembly, or any local authority; or
>
> (c) if he holds any office in:
>
> (i) any trade union; or
>
> (ii) any political party; or
>
> (iii) any other organisation, body or group of persons whatsoever, whether or not it is established under any law, whether it is in Malaysia or outside Malaysia, which has objectives or carries on activities which can be construed as being political in nature, character or effect, or which is declared by the Attorney General by order published in the Gazette, to be an organisation, body or group of person which has such objectives or carries on such activities.
>
> (2) An order made by the Attorney General under paragraph (c)(iii) of subsection (1) shall not be reviewed or called in question in any court.
>
> (3) Where a member of the Bar Council or a Bar Committee, or of any committee of the Bar Council of a Bar Committee, becomes disqualified under subsection (1), he shall immediately thereupon be deemed to have vacated his membership thereof and any office that he may hold therein.

The appellant was dissatisfied with this statutory disqualification. He wished to challenge it. He applied for leave to move for judicial review. The relief he claimed in his written application is as follows:

> 1) That the Applicant be granted leave to apply for a Declaration that, notwithstanding the Applicant's appointment as Vice President of Parti Rakyat Malaysia on 14th July 2001, the Applicant is not disqualified from being a member of the Bar Council 2001-2002.

2) That the Applicant be granted leave to apply for a Declaration that, notwithstanding the Applicant continuing to hold the office of Vice President of Parti Rakyat Malaysia, the Applicant is not disqualified from offering himself as a candidate for election to the Bar Council 2002-2003 and in subsequent years;

3) That the purported disqualification of the Applicant from continuing in office as member of the Bar Council 2001-2002 and offering himself as a candidate for election to the Bar Council 2002-2003 and in subsequent years be stayed pending the final determination of these proceedings pursuant to Order 53 Rule 3(5) of the Rules of the High Court, 1980 and/or under the inherent jurisdiction of this Honourable Court; and

4) That all necessary and consequential directions and orders be given.

The grounds upon which he claimed that relief appears in his statutory statement, filed in support. These are the grounds:

(a) Section 46A of the Act ("the said provision") in purporting to:

(i) disqualify the Applicant from being a member of the Bar Council 2001-2002;

and

(ii) disqualify the Applicant from offering himself as a candidate for election by postal ballot in October/ November 2001 for membership of the Bar Council 2002-2003 and in subsequent years

is unconstitutional by reason of the breach of the fundamental rights of the Applicant entrenched in Part II of the Federal Constitution;

(b) The said provision is contrary to the Applicant's right to freedom of association enshrined in article 10(1) (c);

(c) The said provision is in breach of the equality provisions of Article 8(1);

(d) The said provision results in unfair discrimination of the Applicant contrary to the Article 8(2);

(e) The said provision has the effect of depriving or impinging on his personal liberty contrary to Article 5(1); and

(f) The Applicant's said fundamental freedoms are directly affected or the effect or consequence on the said fundamental rights by the said provision is to make their exercise ineffective or illusory because the Applicant is not permitted to hold the office of Vice President, Parti Rakyat Malaysia and the office of member of the Bar Council simultaneously.

But, as I said a moment ago, the applicant failed in his application and his failure was based wholly on procedural grounds. The second respondent raised two objections in the court below which found favour with the learned judge. They have been repeated before us. However, under pressure of argument, counsel, who had taken extreme positions on their respective cases, were forced to concede ground on both sides, so that the issue now before us is much narrower than it was before the learned judge. I may also add in fairness to the learned judge that the authorities read to us were not drawn to his attention. After the dust of argument had settled by this morning, it is apparent, quite clearly, where the difference of opinion lies between the applicant and the second respondent.

Dato' Aziz, learned senior federal counsel with his usual frankness, put it very neatly. He says that his objection really is, that the declarations sought by the applicant's written application cannot be granted, even if the applicant is right. They are not declarations, he correctly points out, that make a frontal assault upon the constitutionality of s. 46A. They are merely declarations which, even if the facts alleged are proved, cannot be granted. The case is therefore frivolous and vexatious and hence meets the test laid down by an unusually strong Federal Court in *Mohamed Nordin bin Johan v. Attorney-General, Malaysia* [1983] 1 CLJ 130; [1983] CLJ (Rep) 271.

Mr. Thomas' response to this argument is that the objection taken is premature. This, together with any other points already taken at the leave stage are really matters that ought to be considered and dealt with at the hearing of the substantive motion which is yet to be filed.

These arguments of counsel on either side bring into sharp focus the divide between private and public law remedies. In England, where the judicial review provisions are in some respects similar to ours while differing materially in the other respects, cases have gone in both directions. Thus, in *Re Tillmire Common, Heslington* [1982] 2 All ER 615, 621-622 Dillon J (as he then was) following the judgment of Goulding J in *Heywood v. Hull Prison Board of Visitors* [1980] 3 All ER 594, pointed to the ill-advisedness of invoking the general provision governing declaratory relief in O. 15 r. 16 in cases of public law. The English Courts, at that stage, were very concerned that a litigant instead of taking on the heavier burden imposed by O. 53 may attempt to by-pass that rule of court by taking advantage of the less onerous and more generous private law provision in O. 15 r. 16. Even a cursory reading of the judgments in cases I have just referred to as well as the speech of Lord Diplock in *O' Reilly v. Mackman* [1982] 3 All ER 1124 make this concern clear.

I have thus far mentioned cases going the one way. There are several cases going in the opposite direction. I need only mention one of these. It is a decision of critical importance to English practitioners. But it also provides us much needed guidance when construing our own O. 53 which is comparatively new. The case I refer to is *Trustees of the Dennis Rye Pension Fund and another v. Sheffield City Council* [1997] 4 All ER 747. The principal judgment was delivered by Lord Woolf MR, now Lord Chief Justice, the acknowledged authority on modern civil procedure and administrative law in the Commonwealth. There are two passages in his judgment that merit reproduction. The first appears at p. 754 where he said this:

> … What I would suggest is necessary is to begin by going back to first principles and remind oneself of the guidance which Lord Diplock gave in *O' Reilly v Mackman.* This guidance involves recognising: (a) that remedies for protecting both private and public rights can be given in both private law proceedings and on application for judicial review; (b) that judicial review provides, in the interest of the public, protection for public bodies which are not available on private law proceedings (namely the requirement of leave and the protection against delay).

The second passage appears at p. 755. It reads:

> … If it is not clear whether judicial review or an ordinary action is the correct procedure it will be safer to make an application for judicial review than commence an ordinary action since there then should be no question of being treated as abusing the process of the court by avoiding the protection provided by judicial review. In the majority of cases it should not be necessary for purely procedural reasons to become involved in arid arguments as to whether the issues are correctly treated as involving public or private law or both. (For reasons of substantive law it may be necessary to consider this issue). If judicial review is used when it should not, the court can protect its resources either by directing that the application should continue as if begun by writ or by directing it should be heard by a judge who is not nominated to hear cases in the Crown Office List. It is difficult to see how a respondent can be prejudiced by the adoption of this course and little risk that anything more damaging could happen than a refusal of leave.

These observations of Lord Woolf were approved without qualification by a unanimous House of Lords in *Steed v. Secretary of State for the Home Department* [2000] 3 All ER 226.

Acting on this guide, it is my view that in the present case the appellant was entirely correct in invoking the provision of O. 53. It must not be forgotten that O. 53 in its present form was introduced to cure the mischief of its precursor, which was much narrower and more restrictive. Two points may be noted when considering our present O. 53. First, that it begins by referring

to the powerful and enabling provision introduced for the first time in our law by Parliament in para. 1 of the Schedule to the Courts of Judicature Act 1964. Pausing for a moment, let me remind myself of the historical background against which para. 1 was enacted.

Until 1964, the statute that governed the judicial arm of Government was the Courts Ordinance 1948. That Ordinance was passed by our colonial masters under whose yoke we lived until 31 August 1957. On 31 August 1957 we inherited a dynamic Constitution which conferred upon our citizens some of the most cherished and valuable rights that any human being can aspire for. Among these are the fundamental liberties enshrined in Part II. It was obvious to the meanest of intelligence that in the face of such a dynamic document the outdated, archaic and arcane provisions of a medieval society that fashion remedies to meet its needs were wholly inappropriate. Of what use to us are such ancient self-fettering remedies like *certiorari, quo warranto* and the like? Something had to be done to bring federal law in line with dynamism of the Constitution. And so Parliament acted. It repealed the Courts Ordinance and replaced it with the Courts of Judicature Act 1964 into which it incorporated para. 1 conferring upon our High Courts powers much wider than those vested in Queens Bench Division in England. But our courts were limping behind Parliament in the procedural sector. We still clung on to the shackles and fetters imposed upon us by English adjectival law. We forgot all about para. 1. And then finally, the Rules Committee acted to keep in tandem with Courts of Judicature Act 1964. Accordingly, O. 53 in its present form was introduced.

To return to the construction to be given to O. 53, I turn to the second point I wish to make. It is the principle which governs the construction of rules of courts. A rule of court should not be interpreted in such a way as to result in unfairness or produce a manifest injustice: *Bank Of America National Trust And Savings Association v. Chai Yen* [1980] 1 MLJ 198; *Sim Seoh Beng & Anor v. Koperasi Tunas Muda Sungai Ara Bhd* [1995] 1 CLJ 491. So here, a manifest injustice would occur if O. 53 is read restrictively so as to permit an applicant to claim a declaration only where he applies for it jointly with some other remedy.

I might add that under para. 1 of the Schedule to the Courts of Judicature Act 1964, which is drawn from art. 226 of the Indian Constitution and to which in material parts it is identical, our courts have power to issue such orders and grant such relief as is appropriate to the particular circumstances of a given case. Support for this view may be found in the decision of the Indian Supreme Court in *Dwarka Nath v. Income Tax Officer* AIR [1966] SC 81, where at p. 84 I find Subba Rao J, saying this after reproducing art. 226:

> This article is couched in comprehensive phraseology and it *ex facie* confers a wide power on the High Courts to reach injustice whenever it is found. The Constitution designedly used wide language in describing the nature of the power, the purpose for which and the person or authority against whom it can be exercised. It can issue writs in the nature of prerogative writs as understood in England; but the scope of those writs also is widened by the use of the expression 'nature', for the said expression does not equate the writs that can be issued in India with those in England, but also draws an analogy from them. That apart, High Courts can also issue directions, orders or writs other than the prerogative writs. It enables the High Courts to mould the reliefs to meet the peculiar and complicated requirements of this country. Any attempt to equate the scope of the power of the High Court under art. 226 of the Constitution with that of the English Courts to issue prerogative writs is to introduce the unnecessary procedural restrictions grown over the years in a comparatively small county like England with a unitary form of Government to a vast country like India functioning under a federal structure. Such a construction defeats the purpose of the Article itself. To say this is not to say that the High Courts can function arbitrarily under this Article. Such limitations are implicit in the article and others may be evolved to direct the article through defined channels.

Reference may also be made to *P.J. Irani v. State Of Madras* AIR [1961] SC, where Ayyangar J said at p. 1738:

> We do not consider that immunity from interference by the Courts could be sought for orders which are plainly *ultra vires* merely because they were passed *bona fide* in the sense of being without indirect motive. Particularly so when the power of High Court under Art. 226 of the Constitution is not limited to the issue of writs falling under particular groupings, such as the *certiorari*, *mandamus*, etc., as these writs have been understood in England, but the power is general to issue any direction to the authorities, *viz*., for enforcement of fundamental rights as well as for other purposes.

Counsel before us stand upon the common ground that if there is any conflict between O. 53 and para. 1, the latter should prevail. Again, Dato' Aziz senior federal counsel, with his customary frankness concedes that even without O. 53, our courts can issue declarations in public law cases because of the wide powers conferred by para. 1.

Since the High Court has ample power and jurisdiction to grant appropriate relief after hearing full argument on the substantive motion, the point about the motion paper suffering from inadequacies of drafting, justifiably made in present case, comes to naught. If the applicant has asked for remedies which he is patently not entitled to, but adduces facts and establishes grounds entitling him to relief, it is of course open to the judge hearing the substantive motion to invite arguments on the grant of relief appropriate to the applicant's factual situation. I must therefore with all the respect I can gather for Dato' Aziz, reject his argument.

However, in fairness to learned senior federal counsel, there is one other matter which I am obliged to address. As I said, Dato' Aziz has correctly pointed out that this is not a case of collateral attack as suggested by Mr. Thomas with some diffidence in a weak argument by way of a side wind when he opened the appeal. A genuine collateral attack is usually taken by way of defence. The pages of De Smith, Woolf & Joel on *Judicial Review* 5th edn are replete with such cases. I need only mention three in passing. They are *Wandsworth London Borough Council v. Winder* [1985] AC 461 (see in particular speech of Lord Fraser of Tullybelton at p. 508, 509); *Pawlowski v. Dunnington* [1999] Simon Tax Cases 550 (the judgment of Simon Brown LJ), both examples of collateral attack in civil proceedings, and *Boddington v. British Transport Police* [1998] 2 WLR 639, an example of collateral attack in criminal proceedings. At the risk of repetition, the present appeal is not a case of collateral attack.

For myself, I must add a final word. I must be forgiven for expressing my amazement and equal disappointment that in this day and age, applications and suits are disposed of on purely technical and procedural ground without even slightest attempt to ensure that justice according to the merits of a particular case is done. I cannot help feeling that somewhere in the performance of our duty as judges to decide according to law we have forgotten our duty to do justice according to law and the substantial merits of each case. My own feelings are so well expressed by Saville LJ (now Lord Saville) in *British Steel plc v. Customs & Excise Commissioners* [1997] 2 All ER 366, 379 that I need only repeat what he said:

> These proceedings have to date been concerned with the question whether British Steel plc used the correct form of action in which to make the claim for repayment of excise duty from the Commissioners of Customs and Excise.
>
> It is now well over 100 years ago that our predecessors made a great attempt to free our legal process from concentrating upon the form rather than the substance, so that the outcome of cases depended not on strict compliance with intricate procedural requirements, but rather on deciding the real dispute over the rights and obligations of the parties.
>
> The old forms of action have doubtless long been laid to rest, but others have sprung up in their place, giving rise once again to litigation which is devoted to the question whether the right form of action has been used, rather than addressing and resolving the real dispute between the parties.
>
> The present proceedings are of these nature, for the question is whether the claim is properly brought by ordinary action or should first have been advanced by way of judicial review. The question is of vital importance, for under our rules of procedure it is now too late to adopt the latter form of action, while if the wrong form is chosen, it is categorised as an abuse of the process.

> This is only the most recent such case, for over the last decade or so there has been a stream of litigation on this subject, much of it proceeding to the House of Lords. The cases raise and depend upon the most sophisticated arguments, such as the distinction and difference between what is described as 'public' as opposed to 'private' law, whether rights are of a 'private' or 'public' nature, whether 'private' rights depend upon the exercise of 'public' obligations and so on: as well as seeking to decide, in the context of legislation which does not make the position clear, whether or not Parliament did or did not intend to limit or exclude rights that might otherwise exist under Common law. The cost of this litigation, borne privately or through taxation, must be immense, with often the lawyers the only people to gain.
>
> Such litigation brings the law and our legal system into disrepute; and to my mind correctly so. It reinforces the view held by the ordinary person that the law and our legal system are slow, expensive and unsatisfactory. In this day and age it is surely possible to devise procedures which avoid this form of satellite litigation, while safeguarding both the private rights of individuals and companies and the position and responsibilities of public authorities.

For the reasons already given, this appeal is allowed. The order of the learned judge refusing leave and dismissing the application *in limine* is set aside. The applicant is granted leave to apply for judicial review. My learned brothers and I are conscious of the jurisdiction we have, when granting leave, to hear the substantive motion on a formal undertaking to file the same: *Mohamed Nordin bin Johan v. Attorney-General, Malaysia (supra)*. But as pointed out by Dato' Aziz and conceded by Mr. Thomas, that jurisdiction ought not to be exercised in the present instance. There are important questions of constitutional interpretation upon which this court must have the benefit of the primary judge. Accordingly we make the consequential order that the applicant shall have 14 days from today within which to deliver his substantive motion before the High Court. The applicant shall also re-serve his affidavit and statutory statement on both the Attorney General's Chambers and Bar Council. The deposit is refunded to the applicant. By consent, there is no order as to costs here and below.

This is the first time this court is dealing with the new O. 53. It is important that the profession knows soonest possible our views upon the subject at hand. Hence this *ex tempore* judgment. My learned brothers concur with the result and reasoning I have just expressed. We wish to thank counsel on both sides for their assistance without which it would not have been possible for us to deliver this *ex tempore* judgment.